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No. 92-1969

In The

Supreme Court of the United States

October Term, 1992

IN RE: THE COLONY PLACE COMPANY,

Debtor,

DORIS B. HARRISON,

Petitioner,

v.

BANKERS FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, AND JAMES D. WALKER, JR., TRUSTEE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Bankruptcy Court asked the opposing parties to submit proposed findings and conclusions on whether the Trustee's settlement of claims should be approved. Counsel for Respondent Bankers First provided the Bankruptcy Court, but not the opposing party, with courtesy copies of the authorities and pages from the transcripts cited in its proposed order. The proposed order, which cited all of these materials, was served on the opposing party.

The questions presented are whether the factual determinations made by the Bankruptcy Court (that there was no prohibited ex parte communication, and that there was no fundamental unfairness to the Petitioner), and affirmed by the District Court and by the Eleventh Circuit Court of Appeals without opinion were clearly erroneous and whether the Bankruptcy Court abused its discretion in denying the motion to set aside the judgment.

The other question presented is whether the issue stated above involves a departure by the lower Federal Courts so far from the accepted and usual course of judicial proceedings so as to warrant review by this Court on writ of certiorari pursuant to Rule 10 of the Supreme Court Rules.

PARTIES TO PROCEEDING

The caption of the case contains the names of all parties. Bankers First Corporation (publicly held) is the parent company of Respondent Bankers First Federal Savings and Loan Association. Respondent Bankers First Federal Savings and Loan Association has no partially owned subsidiaries.

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OPINIONS BELOW

The opinions below consist of:

1. A Bankruptcy Court order approving a compromise recommended by the Trustee[1] (H-1);

2. A decision by another Bankruptcy Court Judge denying Petitioner's motion pursuant to Bankruptcy Rule 9024 (which incorporates Fed. R. Civ. P. 60) to collaterally attack and set aside the order approving the compromise (C-1);

3. A decision by the United States District Court reviewing and affirming the decision of the Bankruptcy Court (B-1); and

4. A decision by the Eleventh Circuit Court of Appeals affirming the decision of the District Court without opinion (A-1).

RULES INVOLVED

In addition to the rules cited in the Petition, the following rules apply:

Federal Rules of Bankruptcy Procedure Rule 8013.

DISPOSITION OF APPEALS; WEIGHT ACCORDED BANKRUPTCY JUDGE'S FINDINGS OF FACT

[1] All of the opinions below are contained in the Appendix to the Petition for Writ of Certiorari and the citations in this brief are to that Appendix.

On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankrupcy judge's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Supreme Court Rule 10 is set forth in the Appendix to this brief.

STATEMENT OF THE CASE

A. INACCURACIES IN PETITIONER'S STATEMENT OF THE CASE.

Respondents wish to point out an incorrect statement in Petitioner's brief. In her statement of the question presented and also on page 20, Petitioner suggests that cousel for Respondent Bankers First intentionally engaged in prohibited ex parte communication by providing the Bankruptcy Court, but not the opposing party, with copies of the authorities and pages from the transcript cited in its proposed order. This allegation is not correct and is not supported by the record. There was no finding by the Bankruptcy Court of any intentional misconduct by counsel for Respondent Bankers First. On the contrary, the Bankruptcy Court found that while it would have been the better practice to give copies to opposing parties, under the facts in this case, there was no improper ex parte communication (C-35). That finding is fully supported by the evidence and is inconsistent with the statements in Petitioner's brief.

B. NATURE OF THE CASE

This case is one of a series of lawsuits[2] between Respondents and the Petitioner Doris B. Harrison (plaintiff

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[2] Related litigation includes:

FRAUDULENT TRANSFERS:

Adversary proceeding No. 188-0083 in Chapter 7 Case No. 188-00819 was brought by the Trustee to set aside real property conveyances made by Petitioner and her husband as officers of the Colony Place Company to a company they owned ("Landor") on the grounds that the transfers were fraudulent. A default judgment setting aside these conveyances was affirmed by the District Court, and the 11th Circuit. *In re Colony Place Company, Debtor, James D. Walker, Jr., Trustee, v. Landor Condominium Consultants, Inc.*, Case No. 91-8470 (11th Cir. Oct. 2, 1992).

DISPOSSESSORY CASE:

After obtaining stay relief and foreclosing on its collateral, Respondent Bankers First brought a dispossessory action against the Harrisons and Landor (a company owned by the Harrisons) in the Superior Court of Richmond County, Georgia. A writ of possession was granted. The Harrisons appealed, but the Georgia Court of Appeals dismissed the appeal because it was premature. *Landor Condominium Consultants, Inc. v. Bankers First Federal Savings and Loan Association*, 198 Ga. App. 274, 401 S.E.2d 305 (1991).

1989 STATE COURT LAWSUIT:

In 1989, Landor and Ms. Harrison filed an eleven count lender liability lawsuit against Bankers First in the Superior Court of Richmond County, Georgia. Many of these same allegations were specifically rejected by the Bankruptcy Court in approving the compromise (H-1).

Bankers First's motion for summary judgment was granted and this decision was affirmed by the Georgia Court of Appeals. *Landor Condominium Consultants, Inc. v. Bankers First Federal Savings and Loan Association*, 204 Ga. App. 212, 418 SE.2d 772 (1992).

in Bankruptcy Court), her husband D. Landrum Harrison, and a company ("Landor") owned by the Harrisons. The litigation arose from the Harrisons' failed attempt to develop a condominium project in Augusta, Georgia called Colony Place (H-2).

The Colony Place project was owned by the Colony Place Company (controlled by the Harrisons). Landor was the development manager for the project and Bankers First was the lender (H-2). The project failed because construction schedules were not met, large cost overruns were experienced and sales did not meet projections (H-3 to H-4). Eventually, Bankers First agreed to loan over $600,000 more than the Colony Place Company originally projected was needed to build and sell 120 condominium units (H-24). However, a total of only 48 units were built and only 25 of these units were sold (H-25).

The Harrisons claimed Bankers First was responsible for the failed development of the Colony Place project (H-5). The Trustee investigated and recommended compromise of the Harrisons' claims for an option on part of the Colony Place property, but no less than $25,000 (H-5 to H-6, H-37 to H-38). (Bankers First was willing to settle on this basis to minimize further litigation.)

After the Bankruptcy Court (Judge John Dalis)[3] approved the proposed settlement, Petitioner attempted

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[3] There are decisions by two United States Bankruptcy Judges in this case. The first decision was a ruling by Judge John Dalis approving the compromise. The second ruling was made by Judge Lamar Davis denying a motion to set aside the order approving the compromise.

to challenge the approval but did not file her motion to amend within the required time (C-19).

Next, Petitioner collaterally attacked the compromise by filing a motion to set aside the compromise in which she asserted virtually the same thirty-one grounds raised in her untimely motion to amend (C-20). This extraordinary relief was sought pursuant to Bankruptcy Rule 9024.

Specifically, Petitioner claimed that Respondents improperly communicated with the Bankruptcy Court (Judge John Dalis) by furnishing courtesy copies of the cases and portions of the transcript cited in a proposed order which Judge Dalis requested from both parties. Therefore (according to Petitioner), the process by which the decision to approve the compromise was reached deprived her of the opportunity to fully and fairly present her case, and was fundamentally unfair to her. Petitioner made these claims even though the proposed order of Respondents was served on her, so she knew exactly what authorities and portions of the transcripts were relied upon by Respondents (B-9, C-36 to C-37).

At the hearing to consider the compromise Petitioner was heard and called her husband, D. Landrum Harrison who testified at length on her behalf (C-14 to C-15). Also, Petitioner was asked by Judge Dalis to present a proposed order. She submitted an order and received a copy of the order proposed by Respondents (C-15 to C-18). The order proposed by Respondents contained the same citations to cases and portions of the transcript which were supplied to Judge Dalis (B-9, C-36 to C-37).

Bankruptcy Judge Lamar Davis denied Ms. Harrison's motion to set aside the judgment for two reasons, holding that:

First, there were no facts to support an allegation of prohibited ex parte communication since everything communicated to the Bankruptcy Court (Judge John Dalis) was cited in the proposed order furnished to Petitioner (C-35 to C-37).

Second, even if a prohibited ex parte communication had occurred, Petitioner failed to meet the burden of establishing that she was entitled to the extraordinary relief sought because she "utterly failed to demonstrate any lack of due process or fundamental unfairness in the process" (C-37 to C-39).

In support of these holdings, Judge Davis found there was "absolutely no evidence presented at the hearing or otherwise in the record" showing that furnishing the Bankruptcy Court (Judge John Dalis) with copies of the cases and transcript pages cited in the proposed order caused the Bankruptcy Court (Judge John Dalis) to rule in a manner that was procedurally unfair (C-39). This finding was based on the undisputed evidence that Petitioner received a copy of the order proposed by Respondents, knew exactly what authorities and portions of the transcript Respondents were relying upon, and that all material cited in the proposed order of Respondents was fully available to Petitioner (C-23, C-25 to C-26).

Judge Davis further found that Petitioner was given the opportunity to present her case in a lengthy hearing (C-14 to C-15). She was permitted to call witnesses, and did call her husband D. Landrum Harrison, who testified

at length on her behalf (C-15). This testimony was allowed "out of an abundance of caution . . . in order to insure that all parties with a colorable right to be heard were afforded that opportunity" (C-21 to C-22). He also found that Petitioner submitted a proposed order to the court (C-18). On the basis of this factual record, Judge Davis held that there was no showing that a prohibited ex parte communication occurred (C-35) and no showing of fundamental unfairness (C-38).

After review on appeal, both the United States District Court for the Southern District of Georgia (Augusta Division) and the Eleventh Circuit Court of Appeals (without opinion) affirmed the decision of the Bankruptcy Court.

In addition, the District Court reviewed the order of the Bankruptcy Court (Judge John Dalis) approving the settlement and ruled that the findings of facts and conclusions of law were supported by the evidence in the record (B-14).

SUMMARY OF THE ARGUMENT

The Petition for certiorari seeks further review of factual determinations and the decision by the Bankruptcy Court (Judge Lamar Davis) denying a motion to set aside a judgment (C-1) which has been reviewed and upheld by both the District Court and the Eleventh Circuit Court of Appeals (A-1, B-1).

Both grounds upon which the Bankruptcy Court (Judge Lamar Davis) denied the motion to set aside the

judgment were correctly decided and fully supported by the evidence.

On the first ground the Bankruptcy Court correctly concluded, based on the facts in this case, that there was no prohibited ex parte communication (C-35).

On the second ground, the Bankruptcy Court also correctly concluded, based on the facts in this case, that there was no showing of fundamental unfairness to Petitioner since she knew exactly the authorities upon which Respondents were relying (B-9, C-36 to C-37) and was given the opportunity to fully and fairly present her case (C-14 to C-15).

On appeal, the applicable standard of review on questions of fact is whether the findings of the Bankruptcy Court are clearly erroneous. The record shows that the findings of the Bankruptcy Court are not clearly erroneous. On the contrary, they are fully supported by the evidence.

A motion to set aside a judgment is an extraordinary remedy. The applicable standard of review on appeal of such a motion is whether the trial court abused its discretion. The record shows there was no abuse of that discretion in the case at bar by refusing to grant the relief sought.

Therefore, the District Court and the Eleventh Circuit Court of Appeals did not err in affirming the decision of the Bankruptcy Court on both of the grounds stated above.

Furthermore, the case is not one which meets the standard for certiorari under Rule 10 of the Supreme Court Rules since it involves a review of factual findings

made by a Bankruptcy Court following the standards which this Court and the lower Federal courts have applied in a number of cases.

Therefore, this is not a case where a United States Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision". Supreme Court Rule 10.

ARGUMENT

Petitioner seeks to collaterally attack the compromise by her motion to set aside the unappealed judgment pursuant to Bankruptcy Rule 9024 (which incorporates Rule 60(b) of the Federal Rules of Civil Procedure). Rule 60 provides in part:

> On motion and upon such terms as are just, the court *may* relieve a party . . . from a final judgment . . ., for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . (*emphasis supplied*)

Rule 60(b), which provides relief from judgments, is an extraordinary remedy. *Tucker v. Commonwealth Land Title Ins. Co.*, 800 F.2d 1054, 1056 (11th Cir. 1987). In the case of *In re Design Classics Inc.*, 788 F.2d 1384, 1386 (8th Cir. 1986) the court said:

> Relief under Rule 60(b) is an extraordinary remedy. It lies with the discretion of the trial court, and its grant or denial may be reviewed only for abuse of discretion. Rule 60(b) relief is not

appropriate as a substitute for direct appeal of a judgment.

Respondents respectfully submit that the decision of the Bankruptcy Court to deny the extraordinary relief sought by Ms. Harrison under Rule 60(b), and the affirmation of this decision by the District Court and Court of Appeals, is correct for each of the reasons set forth below.

A. NO PROHIBITED EX PARTE COMMUNICATION OCCURRED

The Bankruptcy Court (Judge Lamar Davis) was correct in holding that not all ex parte communication is prohibited and that an ex parte communication does not *per se* require a reversal (C-30 to C-35).

In the case of *In re Colony Square Co.*, 60 B.R. 1003, 1018 (N.D. Ga. 1986), *aff'd*, 819 F.2d 272 (11th Cir. 1987), *cert. den'd.*, 485 U.S. 977, 108 S.Ct. 1271, 99 L.Ed.2d 482 (1988) the District Court held that:

> Due process requires that a litigant be given notice and the opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). Ex parte contacts between a judge and a litigant will not always deprive the adversary of these due process attributes. When a party has been given the opportunity to participate actively in a proceeding and is not prejudiced by the ex parte contact, the requirements of due process have been met. . . . "[W]e reject any notion of due process which would place an absolute prohibition on all ex parte contacts or proceedings." (Cits. omitted)

Judge Davis properly found that, under the facts of this case, providing the Bankruptcy Court (Judge John Dalis) with courtesy copies of cases and excerpts from the record cited in the proposed order was not a prohibited ex parte communication since the proposed order citing these cases and pages from the transcript was furnished to Petitioner (C-23). She knew exactly what cases and pages from the record Respondents were relying upon (C-35 to C-37), and had unfettered access to them (B-10 to B-11, C-25 to C-26).

B. NO SHOWING OF FUNDAMENTAL UNFAIRNESS

The Bankruptcy Court (Judge Lamar Davis) also correctly denied Petitioner's motion on the ground that Bankruptcy Rule 9024 requires a moving party to show that the process was fundamentally unfair (C-38). (The Bankruptcy Court found that even if there was a prohibited ex parte communication, Petitioner "utterly failed to demonstrate any lack of due process or fundamental unfairness in the process" (C-38 to C-39).)

In *West v. Love*, 776 F.2d 170, 176 (7th Cir. 1985), the court held:

> . . . West was required to show by *clear and convincing evidence* that the verdict was obtained through misconduct and that the misconduct was of such a nature that it prevented plaintiff from *fully and fairly presenting his case. Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978). (emphasis supplied)

In *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978), the court held:

> One who asserts that an adverse party has obtained a verdict through fraud, misrepresentation or other misconduct has the burden of proving the assertion by *clear and convincing evidence* . . . The conduct complained of must be such as prevented the losing party *from fully and fairly presenting* his case or defense. *Toledo Scales Co. v. Computing Scale Co.*, 261 U.S. 399, 421, 43 S.Ct. 458, 464 67 L.Ed. 719 (1923) . . . . (emphasis supplied)

Thus, an order will not be set aside unless the process was fundamentally unfair. In *Colony Square*, the Eleventh Circuit held:

> Such orders will be vacated only if a party can demonstrate that the process by which the judge arrived at them was fundamentally unfair. *See also Margoles v. Johns*, 660 F.2d 291, 296 (7th Cir. 1981), *cert. den'd.*, 455 U.S. 909, 102 S.Ct. 1256, 71 L.Ed.2d 447 (1982)[4]

In re Colony Square Co., 819 F.2d 272, 276 (11th Cir. 1987), *cert. denied*, 485 U.S. 977, 108 S.Ct. 1271, 99 L.Ed.2d 482 (1988).

In her argument, Petitioner suggests a different standard for setting aside a judgment on the basis of alleged misconduct. She argues, in effect, that a "per se" rule should apply and that it is not necessary to determine whether the alleged misconduct affected the outcome of the case or deprived Petitioner of the opportunity to be

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[4] Petitioner's reliance on *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) is misplaced, because that case involves a discovery dispute and not Bankruptcy Rules 9003 or 9024 or Rule 60(b).

fully and fairly heard. Petitioner cites *In re Wisconsin Steel Co.*, 48 B.R. 753 (N.D.Ill. 1985) for the proposition that there is a blanket prohibition against all ex parte communication. That decision is not on point, however, because in that case counsel wrote an opinion for the Bankruptcy Judge without the knowledge of the opposing parties. In the case at bar the Bankruptcy Judge requested proposed orders from both sides, and the opposing party was given the draft of the proposed order prepared by Respondents. (C-15 to C-16).

Furthermore, Petitioner suggests an application of *In re Wisconsin Steel* and Rule 9003 that is inconsistent with the language of Rule 60 which provides that a "court *may* relieve a party from a final judgment for . . . misconduct . . . " (emphasis supplied). Rule 60 uses the word "may". It does not provide that such relief is automatic or mandatory. See, *e.g. Hale v. Ralston Purina Company*, 432 F.2d 156, 159 (8th Cir. 1970) where the court said:

> Rule 60(b) motions address themselves to the sound discretion of the trial court and will not be overturned absent an abuse of that discretion.

Petitioner's argument is also inconsistent with other decisions of this Court (discussed in quote below) and the lower Federal courts which have repeatedly reviewed matters of this nature on a case-by-case basis instead of applying a "per se" rule as advocated by Petitioner. A quote from the Eleventh Circuit Court of Appeals opinion in *Colony Square*, 819 F.2d 272, 276 (11th Cir. 1987), *cert. den'd.*, 485 U.S. 977, 108 S.Ct. 1271, 99 L.Ed.2d 482 (1988) discusses the standard which has been applied by this Court and the lower Federal Courts in a number of different factual situations involving ex parte communications:

> The fact that a judge allowed a litigant to draft the court's orders without notice to the opposing party does not automatically invalidate these orders, however. *See, e.g. Rushen v. Spain*, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983) (ex parte communication between trial judge and juror held to be harmless error); *United States v. Adams*, 785 F.2d 917, 920-921 (11th Cir.), *cert. denied*, 479 U.S. 1009, 107 S.Ct. 650, 93 L.Ed.2d 706 (1986) (ex parte conference between judge, witness and government held constitutional) . . . ; *Simer v. Rios*, 661 F.2d 655, 679-681 (7th Cir. 1981), *cert. denied*, 456 U.S. 917, 102 S.Ct. 1773, 72 L.Ed.2d 177 (1982) (ex parte contacts between judge and litigant held not to violate due process). Such orders will be vacated only if a party can demonstrate that the process by which the judge arrived at them was fundamentally unfair. *Margoles v. Johns*, 660 F.2d 291, 296 (7th Cir.1981), *cert. denied*, 455 U.S. 909, 102 S.Ct. 1256, 71 L.Ed.2d 447 (1982); *see generally Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 1584-1585, 89 L.Ed.2d 823 (1986).

See also *Simer v. Rios*, 661 F.2d 655, 679 (7th Cir. 1981) where the Seventh Circuit Court of Appeals held:

> (W)e reject any notion of due process which would place an absolute prohibition on all ex parte contacts or proceedings.

It should also be pointed out that to the extent *In re Wisconsin Steel* implies that a "per se" rule exists, that part of the case was rejected in *Colony Square* at both the District Court and Circuit Court levels. 60 B. R. 1003, 1013-1018 (N.D. Ga. 1986); 819 F.2d 272, 273 (11th Cir. 1987).

The cases cited above show that the applicable standard followed by this Court and the lower Federal courts is a case-by-case review *based on the facts* in each case as was done by the Bankruptcy Court (Judge Lamar Davis) in the case at bar.

The facts in this case do not show fundamental unfairness. Petitioner participated in the lengthy hearing on September 18, 1989 at which her husband, D. Landrum Harrison, testified in opposition to the proposed settlement (C-14 to C-15). She submitted a proposed order for consideration by the Bankruptcy Court (Judge John Dalis), and received a copy of the order proposed by Respondents (C-16, C-23). Petitioner knew exactly the authorities and evidence upon which Respondents were relying (C-25 to C-26, C-36). Petitioner had unfettered access to the materials cited in the proposed order submitted by Bankers First (C-25 to C-26).

Furthermore, Petitioner did not appeal from the order approving the compromise and failed to file a timely motion to amend the judgment (although she did file an untimely motion to amend based on virtually the same alleged errors she sought to raise by her motion to set aside the judgment) (C-20).

Therefore, under the facts of this case, Respondents respectfully submit that the Bankruptcy Court (Judge Lamar Davis) correctly concluded that Petitioner did not meet her burden of showing *by clear and convincing evidence* that furnishing the Bankruptcy Court (Judge John Dalis) with courtesy copies of cases and pages from the record referred to in the proposed order deprived Petitioner of the opportunity to fully and fairly present her

case, or resulted in a process that was fundamentally unfair to her.

C. STANDARD OF REVIEW

On appeal the applicable standard of review of findings of fact is whether the findings of the Bankruptcy Court were clearly erroneous. Bankruptcy Rule 8013; *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518, 528 (1985); *Pullman Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66, 78-79 (1982); *see also In Re Securities Group*, 926 F.2d 1051, 1055 (11th Cir. 1991). Respondents respectfully submit that the findings of fact by the Bankruptcy Court were fully supported by the evidence and were certainly not clearly erroneous.

Furthermore, on appeal from an order denying a motion to set aside a judgment, the applicable standard of review is whether the trial court abused its discretion. *EEOC v. Mike Smith Pontiac GMC, Inc.*, 896 F.2d 524, 528 (11th Cir. 1990); *Marks v. Shell Oil Co.*, 895 F.2d 1128, 1129 (6th Cir. 1990); *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1145 (10th Cir. 1990). The record in this case supports the finding that Petitioner was not entitled to the extraordinary relief sought and the Bankruptcy Court did not abuse its discretion in denying the motion to set aside the judgment.

Lastly, the Petition does not meet the standards for writs of certiorari set forth in Rule 10 of the Supreme Court Rules. The case does not involve a departure by the lower Federal courts from the accepted and usual course of judicial proceedings as required by Rule 10 of the

Supreme Court Rules. The case involves a review of findings of fact by a Bankruptcy Court and a review of a Bankruptcy Court's decision declining to grant a motion to set aside a judgment. In *Appalachian Power Co. v. AICPA*, 80 S.Ct. 16, 4 L.Ed.2d 30, 32, *cert. den'd*, 361 U.S. 887, 80 S.Ct. 158, 4 L.Ed.2d 121 (1959) (per Brennan, J., as Circuit Justice) the class of cases which will be reviewed by this Court on writ of certiorari are discussed:

> But ordinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to a particular set of facts.

CONCLUSION

Respondents respectfully suggest that the Bankruptcy Court correctly denied Petitioner's motion to set aside the judgment for all of the reasons set forth above. Furthermore, the findings of the Bankruptcy Court (Judge Lamar Davis) were fully supported by the evidence and were not clearly erroneous and there was no abuse of discretion in denying the motion to set aside the judgment. Thus, the District Court and the Eleventh Circuit Court of Appeals did not err in affirming the decision of the Bankruptcy Court denying the extraordinary relief sought by Petitioner.

Respondents also respectfully suggest that the case is not one which meets the standards for certiorari set forth in Rule 10 of the Supreme Court Rules since it does not involve a departure so far "from the accepted and usual course of judicial proceedings . . . " as to call for this Court to exercise its supervisory powers.

On the contrary, it involves the review on appeal of a factual determination and exercise of discretion by the Bankruptcy Court, using a procedure and a standard which this Court and the lower Federal courts have followed and applied in a number of cases and which the Bankruptcy Court, the District Court and the Eleventh

Circuit Court of Appeals correctly applied in the case at bar.

For the reasons set forth above, Respondents respectfully suggest that Petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

RULE 10 OF THE UNITED STATES SUPREME COURT

Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari

to review a judgment of the United States Court of Military Appeals.